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No. 94-1596

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1994

MIDWEST DEVELOPMENT, INC.,
PIUS REIGER and LEROY HILT,

Petitioners,

v.

FLAMINGO REALTY, INC. and
TERRY FIELDS,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Nevada

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a state appellate court, without a violation of due process of law, may modify a judgment of the trial court by increasing the amount thereof where the record presents all the facts and there were no errors of law?

PARTIES

Petitioner, Midwest Development, Inc. ("Midwest"), is a Nevada Corporation.

Respondent, Flamingo Realty, Inc. ("Flamingo"), is a Nevada Corporation with its principal place of business in Las Vegas, Nevada. Respondent, Terry Fields ("Fields"), is an individual resident of Boulder City, Nevada.

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On Petition For A Writ Of Certiorari
To The Supreme Court Of Nevada

RESPONDENTS' BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

The Respondents, Terry Fields and Flamingo Realty, Inc., respectfully request that this Court deny the Petition for Writ of Certiorari submitted by Petitioner Midwest Development, Inc.

OPINIONS BELOW

The opinion of the Supreme Court of Nevada (Pet.App. 1a-20a) is reported at 110 Nev.Adv.Opn. 115,

879 P.2d 69. The order denying rehearing (Pet.App. 21a) is unreported.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In is petition, petitioner Midwest Development, Inc., maintains that the opinion of the Supreme Court of Nevada violated is rights to due process as guaranteed by the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

Respondents Flamingo Realty, Inc. and Terry Fields filed a civil complaint in the Eighth Judicial District Court, Clark County, Nevada, against petitioner Midwest Development, Inc. and others, alleging breach of contract, fraud and fraudulent conveyance. (Pet.App. 1a-3a) The lawsuit stemmed from Midwest's failure to pay Flamingo and Fields a real estate commission which they had earned in connection with the sale of a 45-acre parcel of real property situated in Las Vegas, Nevada. "In May of 1990, Midwest had decided to sell the parcel for a new price of $5,250,000.00. Fields had approached Midwest in early September of 1990 and offered to provide a 'ready, willing, and able' purchaser of the subject property. Thereafter, Midwest executed in favor of Fields a nonexclusive listing agreement that recited a 'list price' of $5,750,000.00 and a realtor's commission of 8.75%. The

list price, less the commission, would have netted approximately $5,250,000.00 to Midwest." (Pet.App 2a)

"Fields immediately delivered to Midwest a purchase offer of $5,750,000.00 from Bodysonic, a Nevada corporation whose primary shareholder and officer was a Japanese businessman by the name of Kyota Yamada. However, Bodysonic's purchase offer was contingent upon the 'approval of a joint venture/-partnership agreement by and between buyer and seller.' After intensive negotiations, the parties were unable to reach an agreement regarding the joint venture and Yamada returned to Japan without closing the sale. The listing agreement, which was executed on September 7, 1990, terminated by its own terms on September 20, 1990. (Pet.App. 2a-3a)

"In late 1990, Bodysonic submitted a second purchase offer in the amount of $5,325,000.00 Fields had continuously worked with Yamada in preparing the offer and finding an unrelated joint venturer to aid in developing the property. Bodysonics offer contained a provisions stating that Midwest would be responsible for paying Fields' commission. Midwest delivered a counteroffer to Bodysonic specifying the $5,325,000.00 as a net price and omitting the paragraph relating to Fields' commission. By the parties' own admissions, the only impediment to closing the transaction was Fields' commission. (Pet.App. 3a)

"Midwest ultimately sold the property to respondent Torosan, Inc., ('Torosan') for $5,300,000.00, and Torosan immediately resold the property to Bodysonic for $5,325,000.00. When Fields learned of the latter sale, she demanded that Midwest pay her a commission. Midwest

refused, prompting Fields to file a complaint against Midwest, its principals, and Torosan for fraud, fraudulent conveyance, and breach of contract. . . . (Pet.App. 3a)

"After a bench trial, the district court found that Fields had failed to prove the necessary elements of her claims, and awarded Torosan attorney's fees and costs as damages on its counterclaim. The court also found that Fields had failed to produce a 'ready, willing, and able' purchaser according to the terms of the expired listing agreement. Despite the foregoing, the court did find that Fields had been the procuring cause of the ultimate sale and that she was entitled to compensation. Because there was insufficient evidence in the record to determine the amount to award Fields, the court reopened the trial for the limited purpose of determining the reasonable value of Fields' services." (Pet.App. 3a-4a)

At the reopened hearing, "Fields' expert, Ron Reiss, testified that the customary value of Fields' services was somewhere between 8 and 10 percent of a property's selling price. Reiss buttressed his testimony with significant evidence of similar listings and transactions. However, his opinion was based upon his belief that Fields had complied with the terms of a standard, percentage based listing agreement. Respondents' expert witness, Shirley Rappaport, conceded that real estate commissions are normally determined as a percentage of the selling price. Rappaport nevertheless analyzed Fields' 'experience, income, the quality and quantity of the services performed, duration of the services and other factors' and concluded that Fields' compensation could be calculated by reference to an hourly wage. The district court accepted Rappaport's evidence and determined that

'Fields devoted at least 40 hours per week for a period of six months for $92,304.00, and at least 20 hours per week for two months for $15,384.00, or a total of $107,688.00.' " (Pet.App. 4a)

Following this decision, Flamingo and Fields appealed to the Supreme Court of Nevada. On that appeal, Flamingo and Fields maintained, *inter alia,* that the district court erred when it failed to award them a commission based upon the written listing agreement. They also contended that the district court committed error when, after finding that Fields was the procuring cause of the parcel's ultimate sale, it failed to utilize the commission figure agreed upon by the parties in their listing agreement as the measure of damages for their recovery under quantum meruit. Specifically, Flamingo and Fields argued "that *quantum meruit* is the reasonable value of services, and that the reasonable value of services is determined first by what was specified in the contract, second by what is usual and customary in the community for like services, and third by the value of the services to the person receiving them. It has been demonstrated in this case that the reasonable value of services as per the contract was 8¾% of the net sales price. . . . " (Appellants' Opening Brief, page 20, lines 8-15)

In deciding this matter, the Supreme Court of Nevada found that "[t]he district court did not unreasonably conclude that the 8.75% commission specified in the original agreement was inapplicable under a *quantum meruit* analysis because that agreement was never consummated." (Pet.App.8a) However, the Nevada Supreme Court did hold that the district court should have

awarded Flamingo and Fields a fee based upon the customary commission in the industry, saying:

> " . . . We are persuaded that an award of $450,000.00 to Fields is justified by the evidence of record and the principles discussed above. She was the procuring cause of a very substantial and highly profitable sale, and the victim of an attempt to utilize the benefit of her efforts without paying her a commission. It is both just and equitable that Fields receive damages within the range of the parties' original agreement and that which is customary in the industry." (Pet.App. 9a)

SUMMARY OF THE ARGUMENT

This case does not present an issue which is appropriate for the Court's exercise of its discretionary jurisdiction. Midwest, both in the district court and in the Nevada Supreme Court, was aware that Flamingo and Fields maintained that they were entitled to a commission which was based upon the commission figure to which the parties had agreed in their original listing agreement. In the district court, Midwest challenged this position by presenting evidence that Fields should be compensated on the basis of an hourly rate. In the Nevada Supreme Court, a similar argument was raised. Because the issue of Fields' right to a fee based upon the commission which was customarily paid in the industry was an issue which was always before both courts and, further, because Midwest was never denied the opportunity to present evidence and argument concerning this issue, and in fact did

present evidence and argument on this point, Midwest's right to due process of law was not violated.

ARGUMENTS AND AUTHORITIES

This case does not present a situation wherein Midwest's constitutional right of due process of law was violated. In the trial court proceeding, Flamingo and Fields had consistently maintained they were entitled to a real estate fee which was based upon that commission figure which had been set forth in the original listing agreement of the parties, i.e., 8¾%. After the district court had found that Fields was the procuring cause for the sale and had reopened the trial for the limited purpose of determining the reasonable value of Fields' services, both Midwest and Fields presented evidence and argument in support of their respective positions. In particular, Fields advanced the testimony of her expert "that the customary value of Fields' services was somewhere between 8 and 10 percent of a property's selling price." (Pet.App. 4a) On the other hand, Midwest was afforded the opportunity to challenge, and did in fact challenge this position, by introducing the testimony of its expert that the reasonable value of Fields' services should instead be calculated "by reference to an hourly wage." (Pet.App. 4a) By like token, in the opening brief which Flamingo and Fields filed with the Supreme Court of Nevada, Fields reiterated this same argument, i.e., "that the reasonable value of services is determined first by what was specified in the contract, (and) second by what

is usual and customary in the community for like services." Again, Midwest was afforded the opportunity to oppose, and did in fact oppose, Fields' argument.

Seen in this light, the manner in which Midwest has characterized the Question which is presently before this Court is wholly unfounded. The decision handed down by the Supreme Court was not "unexpected". Rather, the award which the Supreme Court of Nevada made was one which Flamingo and Fields had sought both in the district court and on appeal. Likewise, neither the district court nor the Supreme Court of Nevada denied Midwest the right to present evidence or argument in opposition to Fields' contention that she was entitled to a fee based upon the commission percentage which customary in the industry. In fact, Midwest did present evidence and argument to the contrary in both courts. Because of this, no due process rights are implicated and this case is governed by the well established rule that an appellate court may and should correct a lower court's judgment or decree by increasing the amount of recovery where all facts necessary to justify a judgment for the correct amount have been found by the trial court, or the facts are not in dispute and could not be varied on a new trial. *Bass v. Ring*, 210 Minn. 598, 299 N.W. 679 (1941); *Burton v. Eureka Bank*, 122 Miss. 355, 84 So. 247 (1920); *Campbell Const. Co. v. Saunders*, 230 Mich. 299, 203 N.W. 170 (1925); *City of Pasadena v. Estrin*, 212 Cal. 231, 298 Pac. 14 (1931); *Costello v. Schult*, 265 Wis. 243, 61 N.W.2d 296 (1953); *Croan v. Banner Ohio Transfer Co.*, 45 Ohio Law Abs., 65 N.E.2d 910 (1943); *Crutcher v. Scott Pub. Co.*, 42 Wash.2d 89, 253 P.2d 925 (1953); *Cunningham v. Spencer*, 111 Okl. 217, 239 Pac. 444 (1925); *Giumarra v. Harrington Heights*,

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CONCLUSION AND PRAYER

This case does not involve a violation of Midwest's right to due process of law. Accordingly, Fields and Flamingo pray that the Court deny Midwest's Petition for Writ of Certiorari, because the case presents no issue appropriate for the Court's review, and because the decision of the Supreme Court of Nevada was not in error.

Respectfully submitted,

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